GUERRILLA WARFARE AND HUMANITARIAN LAW

by Michel Veuthey

1. Actuality of humanitarian law and of guerrilla warfare

More than seven years have elapsed since the first edition of this work. Seven years which have seen an increase rather than a decline of violence, and often an increasing contempt for life and for fundamental human rights.

1. Guerrilla warfare

The end of the Vietnam war and the successful outcome of a great number of struggles for decolonization have not resulted in any decrease of guerrilla warfare: guerrilla fighters have sometimes exchanged roles with their former opponents; the names change, but the roles remain.

The same tragic misdeeds against civilians and prisoners recur, multiply and spread: violence begets violence and terrorism counter-terrorism, which, in turn, leads to even greater terrorism or causes it, instead of preventing it.

The international community seems to be going through a period of chaos, at least for a few years.

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[1] Mr. Michel Veuthey is the author of the work entitled "*Guérilla et droit humanitaire*", published in the *Collection scientifique de l'Institut Henry-Dunant*, Geneva, 1976. A second edition of this work has recently been published (ICRC, Geneva, 1983), for which M. Veuthey wrote a new chapter in its introduction, reprinted here with his kind authorisation. This second edition has a bibliographical annex, listing more than five hundred titles of publications on humanitarian law and guerrilla warfare published between 1977 and 1982.

In the course of these past few years, the deterioration of the international political climate has led to a growing tendency to resort to force in international relations. Any pretext is used to justify violence, and this could also mean, if we are not careful, a regression of humanity.

2. Humanitarian Law

The Geneva Conventions of 1949 and the 1977 additional Protocols constitute, in many situations, fragile yet effective barriers, barring the road to a return to barbarism. Even if this situation of chaos were to affect their formal application, humanitarian principles must nevertheless be maintained.

While the multiplication of present confrontations tends to make universal humanitarian principles increasingly less prominent, humanitarian needs increase in the same proportion. In this situation, a new international humanitarian order becomes imperative, not so much by way of a new codification, which in the present circumstances would tend to dilute and minimize the achievements so far accomplished, but through an increased awareness and integration of common values to mankind as a whole.

2. The adaptation of humanitarian law to contemporary conflicts

1. The achievements of the Diplomatic Conference

The task of adapting humanitarian law to the reality of present-day conflicts was carried out, in a most remarkable manner, by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in Geneva from 1974 to 1977.

The humanitarian codification of 1977 is in fact an important step forward: the Protocols additional to the Geneva Conventions of 1949 contain several essential provisions which take into account national liberation wars and armed resistance against occupation, their material means of warfare and their specific juridical characteristics and problems. Finally, Protocol I questions the differentiation with regard to guerrilla warfare which had existed in the texts formulated between 1874 and 1974.

Thus, article 1 of Protocol I, in its paragraph 4, acknowledges the international character of armed conflicts for self-determination; article 44 of the same Protocol broadens the conditions for enabling

members of resistance movements to receive the status of prisoner of war; article 96 allows a liberation movement to declare formally its intention to apply the provisions of humanitarian law. The provisions on the protection of the civilian population represent similarly one of the major achievements of this new codification.

2. The limits: to be found essentially in interpretation

The limits of these Protocols are to be found not so much in the texts but in the restrictive interpretation which could be given to them.

3. Participation of liberation movements

The Diplomatic Conference held in Geneva made humanitarian law universal by widening the circle of States and other participants in the negotiations, including national liberation movements which made their contribution to the Diplomatic Conference, having been invited to participate fully in its discussions and in those of its major Commissions and even to sign the Final Act of the Conference. Many of these liberation movements have in the meantime become independent, after prolonged struggles.

One of the tasks of guerrilla fighters who have become heads of States should be to strengthen this humanitarian law codification by protecting what has been so far achieved and also by reducing the scope for restrictive interpretations; this strengthening can be accomplished in three ways: firstly, by ratification of the Protocols and of the Conventions; secondly, by dissemination of their essential provisions, and lastly, by incorporation of these new humanitarian norms into international law and internal law.

4. Progress as to substance

The Diplomatic Conference has enriched the codification of humanitarian law with two Protocols additional to the Geneva Conventions, which extend the scope of protection, both by broadening the field of application and by enlarging the substantive provisions; formal obstacles, regarding characterization of situations and persons, have of course not been completely removed but the basic contribution of this Conference remains nevertheless considerable.

The Diplomatic Conference on humanitarian law has in a way enshrined the *unity of content* of the main points of the law of war (The Hague rules), of humanitarian law (Geneva Conventions) and of human

rights, whose fundamental provisions and principles are restated in the two Protocols.

Even while we await the universal ratification of these two new instruments, the essential provisions adopted from 1974 to 1977 in Geneva constitute, together with the Conventions of 1949, the terms of reference of "*the dictates*" *of contemporary* "*public conscience*".

Nearly all the articles of Protocol I were adopted by consensus; even where a consensus was not achieved, the number of negative votes was negligeable; the fundamental rules embodied in the First Protocol accordingly reflect the universal *opinio juris* as to the rules of positive law which govern all international armed conflicts.

5. Equality of belligerents and protection against aggression

It must also be pointed out that this Protocol stresses from the outset the principle of the *equality of the belligerents*; it is stated in its Preamble that "the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict".

While safeguarding the principle of the equality of the belligerents, Protocol I has strengthened the *protection of belligerents* who fight on their own territory *against an alien invader* : article 44 has enshrined the principle of popular defence and abolished the distinction between "regular" and "irregular" combatants or between "legitimate" and "illegitimate" combatants.

6. Main fields of achievement

It remains now to be seen whether the process of ratification and the absence of reservations which could deprive this renovated law of its main effectiveness will have the result of *conserving this Geneva achievement* on:

— the essential issue of the need to accept the fundamental principle of humanitarian law whereunder all adversaries must be treated as human beings;

— the application of these norms, both old and new, to the situations and persons falling within the extended scope of application of Protocol I and of the new one of Protocol II;

— the agreed limitations on methods and means of warfare;

— the rule that the wounded, sick and shipwrecked must benefit from the respect, the protection and the treatment which these Protocols have reaffirmed;

— the rule that prisoners must benefit from the status, or at least the treatment, set forth in the Protocols;

— the rule that civilian persons and their essential objects must be protected against hostilities as the Protocols bring it for the first time into positive law;

— the rule that the responsibilities of the High Contracting Parties and of the Parties to the conflicts must be fully assumed and that the enforcement machinery and organs must be effectively used.

3. Essential questions

Humanitarian law is still not a substitute for peace; it remains the barrier of humanity in the face of bloodthirsty provocations. Its application remains a unique testimony of reason and of hope, of control, of force and of mercy in the midst of murderous aberrations.

Is law helpless against warfare, and humanity helpless against violence? Are they "realists" those who advocate the practice of torture, of summary executions and of "disappearances" against the guerrilla, and those guerrilla fighters who, in turn, call for indiscriminate attacks and the summary convictions of prisoners?

The chain of torture, executions, disappearances and taking of hostages and blind criminal attacks, is set in a vicious circle of violence and destruction, which is made even worse by the multiplication of economic, political, and military crises that affect also legal and humanitarian values. The prospect, ever more pressing, of a "total war", total because of the means of destruction used or else mainly because of the attitude of the parties to the conflict, makes it increasingly essential to enhance respect for these principles; all too often, an opponent is denied his status as a human being, and ideological confrontation eradicates the sense of common humanity.

Accordingly, before we even begin to describe the improvements brought about by the two Protocols, which also reflect a parallel improvement of certain instruments on human rights, *the foundations and principles in the matter must be reaffirmed,* starting with the value of life, in particular that of human life, the dignity proper to the human being and the need to safeguard the essential values of civilisation and harmony.

This emphasis placed on principles may become even more necessary because of the weakening of respect for international law, despite the proliferation of these instruments and notwithstanding the claims to progress of contemporary civilisation, seeing that the law is being openly violated or even flouted, that formal objections are made to its application, and even that new situations fit with difficulty into the categories specified in the codifications.

Since human rights are now in their third generation (individual rights, collective rights, and finally rights to peace), humanity must not lose sight of the universal values represented by the humanitarian principles of the Red Cross. Those principles were not invented, of course, by Henry Dunant, but were put into practice in a spectacular way at Solferino. Extended to the scale of the planet, albeit with various interpretations, with diverse emphases and in different degrees, they belong to all times and to all civilisations.

At a time when dissonant and discordant trends, pessimism and cynicism seem to prevail, it is certainly necessary to reaffirm that the carrying out of a humanitarian policy and the application of non-degrading treatment to prisoners as well as to entire civilian populations constitute factors of appeasement against the escalation of hatred. Perhaps also it would be appropriate to reflect more deeply on the truth of Fridtjof Nansen's statement that "love of one's neighbour is practical politics"...

4. Scopes of application

1. A question of life or death

The definition of the scope of application of the various instruments of humanitarian law is absolutely fundamental; it is a question of life or death for the persons concerned: the difference between the ordinary criminal shot at a street corner or in the woods and the prisoner who surrenders with the honours of war is more than a merely stylistic one.

2. Wars of national liberation

The scope of application of humanitarian law, of Protocol I and of the four Geneva Conventions of 1949, has been, in theory at least, considerably enlarged by article 1, paragraph 4, of Protocol I, which provides that this Protocol and the four Conventions of 1949 shall apply to the wars of national liberation, therein defined as "armed conflicts in which peoples are fighting against colonial domination and alien occu-

pation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

That major innovation must not be necessarily confined in a limited historical context or hastily characterized as "subjective" in nature. The realities of armed conflicts, very soon after the closing of the Diplomatic Conference, showed patently that certain parties intended to extend it to a dimension other than the colonial one. The future will undoubtedly show the value of this provision, whose adoption gave rise to passionate debates—perhaps one more sign of its necessity and relevance.

3. Civil wars

Another innovation of this Diplomatic Conference, with regard to material field of application, is in Protocol II, whose article 1 defines its limits of application in narrower terms than article 3 common to the four Geneva Conventions of 1949; the simplified version adopted in the last session of the Diplomatic Conference, on the initiative of the Pakistan delegation, should render its application easier, by facilitating its understanding and by easing the conditions for its entry into force.

4. Four types of conflicts

With these two new definitions for its application, positive humanitarian law accordingly now knows four types of armed conflicts:

1. international armed conflicts between States, according to article 2 common to the four Conventions of 1949 and according to article 1, paragraph 3, of Protocol I;
2. wars of liberation as described in article 1, paragraph 4, of Protocol I;
3. armed conflicts of a non-international character, according to article 1 of Protocol II;
4. armed conflicts of a non-international character, according to article 3 common to the four Geneva Conventions of 1949.

5. Possible overlapping

These various forms of conflict can link onto one another, be simultaneous, follow one another in time, be concentrated in a small area or on the contrary spread to neighbouring countries.

The Diplomatic Conference on humanitarian law has indeed not dispelled all the legal ambiguities in the matter; it is not uncommon for confrontations between foreign troops on the one hand and between government forces and rebels on the other to coexist, thereby increasing the legal, political and humanitarian complexity of the situation.

6. The common article 3 as a safeguard clause

The controversy around article 1, paragraph 4, of Protocol I, the misgivings of certain States regarding Protocol II, the obstacles which all too often still stand in the way of the formal application of the four Geneva Conventions of 1949, all point to the fact that article 3 remains fully valid in all armed conflicts, whether or not international in character, because this article constitutes a simple statement of fundamental principles, although its scope of application is both flexible and broad. Protocol II, in its Preamble, recalls accordingly the fundamental value of the humanitarian principles enshrined in article 3 common to the Geneva Conventions of 1949 and in international instruments relating to human rights.

7. Restatement of the Martens clause

Note should also be taken of the restatement of the "Martens clause" in article 1, paragraph 2, of Protocol I, as well as in the last paragraph of the Preamble to Protocol II: thus, in cases not covered by the law in force, the victims remain under the protection of the principles of humanity and the dictates of public conscience.

8. Unilateral declarations under article 96 of Protocol I

Another considerable innovation of this renovated humanitarian law is embodied in article 96 of Protocol I whose paragraph 3 provides for the entry into force of the Conventions of 1949 and of Protocol I itself by means of a "unilateral declaration addressed to the depositary by the authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in article 1, paragraph 4". The main problem with this provision is that this declaration implies not only the will of the liberation movement but also the prior ratification by its adversary.

In the absence of bilateral agreements, such as those provided for in the common article 3 or in the procedure set forth in the said article 96, which is difficult to apply in a war of liberation, we must bear in mind the possibility of "triangular agreements", a formula whereunder the

ICRC collects the concording declarations of the parties to a conflict concerning the application of humanitarian law or humanitarian principles. Such concording declarations have been made in many conflicts, not all of them necessarily falling within the scope of application of Protocol I or of the Geneva Conventions as a whole, by the following movements:

— the ANC (African National Congress of South Africa), declaration addressed to the ICRC on 28 November 1980;
— the SWAPO (South West Africa People's Organization), declaration addressed to the ICRC on 25 August 1981;
— the EPLF (Eritrean People's Liberation Front), declaration addressed to the ICRC on 25 February 1977;
— the UNITA (National Union for the Total Independence of Angola), declaration addressed to the ICRC on 25 July 1980;
— in Afghanistan, by the ANLF (Afghan National Liberation Front) by means of a declaration addressed to the ICRC on 24 December 1981, by the Hezbi Islami (declaration addressed to the ICRC on 7 September 1980) and by the ISA (Islamic Society of Afghanistan) (declaration addressed to the ICRC on 6 January 1982);
— the PLO (Palestine Liberation Organization), by means of several declarations addressed to the ICRC, the last of which on 7 June 1982;
— the MNLF (Moro National Liberation Front) of the Philippines, by means of a declaration addressed to the ICRC on 18 May 1981.

Such declarations, even if they do not always relate to the whole body of humanitarian law, and even if they do not always take the form laid down in the said article 96 because of the obstacles mentioned above, have nevertheless their full value, provided of course that they reflect the will of the movements concerned and are consistent with their effective means to apply humanitarian law.

In the absence of article 96 of Protocol I, there remains the provision in the second sentence of the third paragraph of article 2 common to the four Geneva Conventions of 1949: this provision states that "They (the Powers in conflict) shall furthermore be bound by the Convention in relation to the said Power (a Power in conflict not party to the present Convention), if the latter accepts and applies the provisions thereof".

9. Other complementary instruments

With regard to the scope of application, mention must also be made of other instruments of humanitarian law in the broadest sense, whether it is

those on the law protecting refugees, or the international instruments on human rights: in their application, these various instruments do not exclude one another but often supplement each other instead.

10. Avoiding objections as to applicability

Often the application of these various instruments, particularly in situations of armed conflict, runs into political obstacles. Accordingly, the Diplomatic Conference attempted, in each of the two Protocols, to remove one of the major obstacles in each of the specific situations concerned:

— in Protocol I, by means of its article 4 ("Legal status of the Parties to the conflict") which provides that the application of the Conventions and of the Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict, nor of the territory in question;

— in Protocol II, article 3 ("Non-intervention") stipulates that nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or as a justification for intervening, directly or indirectly.

11. Distinctions between humanitarian protection and legal status

The divergence of opinions of the Parties as to the applicability of the Conventions and of the Protocols is of considerable importance, since it can prevent the application and effectiveness of the rules set forth in them. We therefore feel it necessary to reaffirm, even after the Diplomatic Conference on humanitarian law, an essential distinction between protection and qualification—status of the conflict, of the parties to the conflict, of the territories and of persons. When the parties cannot reach agreement on characterization, and especially when they reject, or when only one of them rejects, the application of humanitarian law in its totality, it is appropriate to draw from the Protocols and the four Conventions those principles which must apply in all situations and according to which:

— the wounded and the sick must be taken care of and protected;

— the prisoners must receive a humane treatment;

— the civilian population and objects which are civilian in character must be respected and protected.

In this meaning, the "Fundamental rules of international humanitarian law applicable in armed conflicts", published by the ICRC and

the League of Red Cross Societies in 1979, can constitute the "standard rules" for the parties to a conflict.

12. Pragmatic priorities: legal, material and humanitary criteria

We would like also to draw attention to another practical consideration, with which both the international community and the international humanitarian organizations are confronted in their assistance and protection activities: with the increasing number of victims, will it be necessary one day to set priorities which would not always be legal in nature? Which should then be the criteria for humanitarian action? Will they depend on the possibility of providing relief and protection under authorizations granted by the authorities in charge? Or else on the possibility of obtaining financial support for the assistance to and protection of victims of one or other conflict? Or must they take into consideration the fundamental principles of the Red Cross of impartiality and humanity, according to which relief must be extended to individuals in consonance with their suffering and priority must be given to the most urgent needs?

5. Methods and means of warfare

1. Generally applicable limitations

Prior to the Diplomatic Conference, and even before the Conference of government experts, the ICRC found it necessary to state clearly that nuclear, chemical and bacteriological weapons were the subject of international agreements, or of discussions between governments, and that the ICRC did not intend to deal with them when presenting its draft Protocols.

Nevertheless, Protocol I in particular contains a series of provisions, most of them restatements of The Hague codification, which introduce limitations on the methods and means of warfare, limitations which should apply to all types of weapons without any distinction or exception.

2. International armed conflicts

Protocol I, in its Part III, Section I, articles 35 to 42, contains elements the importance of which deserves to be stressed. The following provisions must, in particular, be noted:

— article 35 ("Basic rules"), which restates the principle embodied in article 22 of The Hague rules, according to which the right of the

Parties to the conflict to choose methods or means of warfare is not unlimited; paragraph 2 restates the notion of unnecessary suffering, which could call for interpretation as far as details are concerned but which is perfectly clear in its essence; "the prohibition to cause widespread, long-term and severe damages to the natural environment", also set forth in article 55 of the same Protocol, answers a real need, in the light of the experience gained from a number of conflicts, both past and recent;

— article 37 ("Prohibition of perfidy") introduce likewise the notion of good faith as between adversaries. The examples of perfidy given in paragraph 1 (a)-(d), as well as the definition of ruses of war in paragraph 2, should facilitate the understanding and application of this key provision which serves to establish a minimum of confidence between belligerents;

— article 40 ("Quarter") prohibits "to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis". In its simplicity, this provision meets a need which has often been felt in guerrilla conflicts.

The question of weapons is dealt with only in article 36 ("New weapons"), which places the High Contracting Parties under an obligation to determine whether the use of a new weapon, means or method of warfare would be prohibited by humanitarian law, when they study, develop or acquire a weapons system.

3. Nuclear weapons and humanitarian law

The question of whether nuclear weapons, or some of them, could fall within the scope of these articles 35, 36 and 40, or within the scope of other provisions protecting the civilian population, the wounded, the prisoners and the natural environment, deserves to be raised in this context, as well as the question of the use of other methods or weapons which have not been specifically prohibited, such as certain fragmentation bombs, which have recently been used in a guerrilla warfare situation.

4. Chemical weapons and bacteriological warfare

Lastly, it is obvious that the question of the use of bacteriological and biochemical weapons has in recent years become of topical interest in several guerrilla warfare conflicts and that the control of the application of the rules of the Geneva Protocol of 1925, and of other relevant instruments, needs to be strengthened if we wish to avoid a deterioration of the situation.

6. Wounded and sick

1. A dual extension of the protection

The Diplomatic Conference has brought about a dual contribution in the field of protection:

— first, by means of an extension of the protection provisions of the Geneva Conventions: this protection, until then essentially limited to military personnel, has now been extended to wounded and sick civilians as well as to civilian medical personnel and to civilian hospitals;

— secondly, by an increased protection of medical transports, especially medical aircraft.

2. Impunity of medical duties

It is of particular interest to note article 16 ("General protection of medical duties") of Protocol I which should ensure the effective protection of medical personnel and wounded in situations of guerrilla warfare, and which provides that:

— no person shall be punished for carrying out medical activities;

— no person engaged in medical activities may be compelled to refrain from performing acts required by the rules of humanitarian law;

— no person engaged in medical activities may be compelled to give to anyone any information concerning the wounded and sick who are, or have been, under his care.

This provision is supplemented by that of article 17 ("Role of the civilian population and of aid societies") which provides, in the last sentence of paragraph 1, that no one shall be harmed, prosecuted, convicted or punished for having collected and cared for the wounded.

3. Protocol II: clarity and conciseness

Protocol II, in its Part III (articles 7 to 12) contains provisions which are a model of conciseness and clarity. In particular, article 10 ("General protection of medical duties"), which corresponds to article 16 of Protocol I, should be noted. The proviso "subject to national law", contained in paragraphs 3 and 4 of article 10 of Protocol II weakens, however, the impact of the first two paragraphs, whose meaning is perfectly clear.

7. Prisoners

1. Three essential contributions

The Diplomatic Conference has made an important contribution to the protection of prisoners in three different ways:

— by reaffirming the fundamental rules—restated from The Hague rules—as to quarter and as to the safeguarding of an enemy *hors de combat*, in articles 40, 41 and 42 of Protocol I;

— by redefining and enlarging the categories of combatants and prisoners of war, in articles 43, 44 and 45;

— by laying down fundamental guarantees for all those persons who are not recognized as prisoners of war, both in Protocol I (article 75) and in Protocol II (articles 5 and 6).

2. Spies and mercenaries

The questions of spies (article 46) and of mercenaries (article 47), so important in guerrilla warfare, are likewise dealt with in the renovated humanitarian codification: these persons, although not entitled to claim privileged protection, benefit nevertheless from the fundamental guarantees.

3. Status of combatant and of prisoner of war

Although not absolutely clear in this respect, articles 43, 44 and 45, if interpreted in a humanitarian and generous manner, in the spirit of the Martens clause, should allow for a better balance than in the past with regard to the protection of prisoners of war of all the Parties to a guerrilla-type conflict: the presumption of prisoner of war status, the simplification of the conditions to obtain this status, do not represent a "political victory" for a certain tendency in the Diplomatic Conference, but reflect rather the very concrete experience gained in a series of conflicts since 1949, in which the need had clearly emerged to redress the balance of this important part of humanitarian law in the interests of all the parties.

8. The civilian population

1. New indispensable rules

It is in the field of the protection of the civilian population and civilian objects that the Diplomatic Conference made the most important and the most necessary contribution.

The civilian population remains at the center of armed conflicts, with the massacres of civilians, refugees, old people, women and children in contemporary conflicts. An aggravation of these acts of "terrorism", both in the number of such acts and in the means used against members of the civilian population, must not be ruled out. The possibility of nuclear terrorism, by States or by groups of guerrilla fighters, is increasing, with the proliferation of nuclear technology, both peaceful and military.

Demographic developments, together with the increase in the power of weapons and of the means available to regular armies, police forces or even groups of guerrilla fighters in order to threaten entire populations, are such that the number of victims of potential conflicts is likely to increase, thus multiplying the amplitude of relief and protection operations to be undertaken by the ICRC and the international community.

The civilian persons who at present benefit from the protection of humanitarian law, in guerrilla-type conflicts as well as in all contemporary or future conflicts, are increasingly difficult to define, contrary to what used to be the case, for example, of civilian internees within the meaning of the fourth Geneva Convention or even the entire civilian population of an occupied territory in respect of which the applicability of the said Convention had been recognized.

The potential civilian victims could be displaced masses, starving masses or terrorised masses.

Among the civilian victims of conflicts, refugees and displaced persons present acute problems: with the multiplication of conflicts, the combination of wars, shortages, or natural catastrophes, with the attraction which rich countries exert on the masses from poor countries, and with the tendency of certain countries to export their problems to other countries—neighbouring or distant—these refugees or displaced persons are likely to be even more numerous in the coming years and to involve considerably greater problems.

The protection of these refugees and displaced populations against hostilities of all kinds on the part of States or groups of guerrilla fighters, is one of the problems at present not yet solved completely in law, and still less in practice.

At a time when hunger afflicts three quarters of humanity, and causes at present more deaths than all the wars put together, dramatic consequences will ensue from the destruction, by the Parties to a conflict, of the means for agricultural production or from the obstruction of relief activities in favour of stricken civilian populations.

This being so, the new provisions of the two Protocols relating to the protection of the civilian population deserve special mention.

2. International armed conflicts

Protocol I, in its Part IV, articles 48 to 78, innovates in many ways in written law, by codifying what was until now for the most part customary law. In particular the following provisions should be noted:

— article 48 ("Basic rule"), which imposes upon the Parties to the conflict the obligation at all times to distinguish between the civilian population and combatants and between civilian objects and military objectives, and to direct their operations against military objectives only;

— article 50 ("Definition of civilians and civilian population"), which lays down a presumption of the civilian character of a person in case of doubt (paragraph 1) and states that the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character (paragraph 3); this provision should serve to eliminate certain pretexts to attack a civilian population, especially in guerrilla warfare situations;

— article 51 ("Protection of the civilian population") and especially its paragraph 3, which recognizes the interchangeable character of the activities of combatants and civilians, thereby meeting the objection based on the fact that some persons are guerrilla fighters by night and peasants by day;

— article 52 ("General protection of civilian objects") with the presumption that an object is dedicated to civilian purposes, contained in paragraph 3;

— article 54 ("Protection of objects indispensable to the survival of the civilian population") which prohibits the starvation of civilians as a method of warfare;

— article 55 ("Protection of the natural environment");

— article 56 ("Protection of works and installations containing dangerous forces") which reflects in part the experiences of recent guerrilla conflicts, particularly in Vietnam;

— article 57 ("Precautions in attack") which states the principle in its paragraph 1 and gives a list of precautions in its paragraphs 2, 3 and 4;

— article 58 ("Precautions against the effects of attacks") which states that the Parties to the conflict shall, to the maximum extent feasible, avoid locating military objectives within or near densely populated areas;

— article 59 ("Non-defended localities");
— article 69 ("Basic needs in occupied territories");
— article 70 ("Relief actions");
— article 73 ("Refugees and stateless persons");
— article 74 ("Reunion of dispersed families");
— article 75 ("Fundamental guarantees"): since it was possible to call article 3 of the Conventions a mini-Convention in itself, this article 75 can be properly described as a mini-Protocol.

3. Non-international armed conflicts

As for Protocol II, in its Part IV, articles 13 to 17, it restates for the most part the 31 provisions of Protocol I:

— article 13 ("Protection of the civilian population") restates in 3 paragraphs articles 48 to 51 of Protocol I;
— article 14 ("Protection of objects indispensable to the survival of the civilian population") corresponds, in a summarized but clear form, to articles 52 to 54;
— article 15 ("Protection of works and installations containing dangerous forces") is the equivalent of article 56 of Protocol I;
— article 16 ("Protection of cultural objects and of places of worship") is the counterpart of article 53 of Protocol I;
— article 17 ("Prohibition of forced movements of civilians") corresponds to combat practices which were only too widespread in guerrilla-type conflicts.

4. Immediately applicable norms

The convergence of these rules in the two Protocols, combined with the fact that the provisions in question largely codify rules of customary law, should make it possible to apply these limitations in contemporary conflicts, without having to wait for the formal entry into force of these Protocols in certain given conflicts: it seems hardly possible for certain Parties to the conflict to denounce the attacks against civilian populations by their opponents while at the same time refusing the application of these essential norms to their own military operations.

The importance of these rules could be underlined by a declaration like the one adopted by the International Red Cross Conference, Vienna, 1965, restated by the General Assembly of the United Nations in 1968.

These provisions, either as to their principle, or for the purpose of enforcing them in a specific conflict or as between certain Parties to a

conflict, all of them not formally bound by the Protocols, could also be the subject of triangular agreements, the ICRC serving as recipient of the concording declarations made by the Parties to the conflict.

9. Application (implementation)

1. A prudent reaffirmation

It is perhaps in the field of the machinery for implementation of humanitarian law that the Diplomatic Conference showed the greatest hesitation as to the reaffirmation and development of humanitarian law.

2. Primary responsibilities

The Diplomatic Conference reaffirmed the primary responsibility of the High Contracting Parties and of the Parties to the conflict in the application of humanitarian law:

— article 1, paragraph 1, of Protocol I restates article 1 common to the four Geneva Conventions of 1949, according to which the High Contracting Parties undertake to respect and to ensure respect for the Conventions and the Protocol in all circumstances;

— article 80 ("Measures for execution") provides that the High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures, give orders and instructions, for the execution of their obligations;

— article 6 ("Qualified persons") provides that the High Contracting Parties shall endeavour, with the assistance of the national Red Cross/ Red Crescent Societies, to train qualified personnel to facilitate the application of humanitarian law;

— article 82 ("Legal advisers in armed forces") provides that the High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available to advise military commanders;

— article 83 restates the corresponding provisions of the Conventions of 1949 on the obligation of the High Contracting Parties to disseminate as widely as possible, in time of peace as in time of armed conflict, humanitarian law;

— article 84 ("Rules of application") provides that the High Contracting Parties shall communicate to one another, through the depositary,

their official translations of this Protocol, as well as the laws and regulations which they may adopt to ensure its application;

— articles 85 to 89 reaffirm and supplement the relevant provisions of the Geneva Conventions on the penal repression of breaches of humanitarian law, placing particular emphasis on breaches of the rules protecting the civilian population;

— article 7 ("Meetings") provides that the depositary State shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol.

3. Protecting Powers and substitutes

The system of Protecting Powers has been both reaffirmed and supplemented in the 7 paragraphs of article 5 ("Appointment of Protecting Powers and of their substitutes").

4. ICRC and Red Cross

Article 81 ("Activities of the Red Cross and other humanitarian organizations") renews the mandate of the ICRC and other components of the Red Cross and of the Red Crescent, as well as of other humanitarian organizations, to act in favour of the victims of conflicts.

5. International Fact-Finding Commission

An "International Fact-Finding Commission", optional in character, is provided for by article 90 to enquire into any facts alleged to be a grave breach and to facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.

6. Non-international armed conflicts: a minimum of control

As for Protocol II, it provides explicit responsibilities only for the High Contracting Party and for "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" (article 1, paragraph 1). Article 18 provides that relief societies may offer their services and act subject to the consent of the High Contracting Party concerned. Article 3 common to the Geneva Conventions of 1949 remains still the basis on which the ICRC may offer its services to the parties.

7. Role of the United Nations

The role of the United Nations is provided for in article 89, entitled "Co-operation", which specifies that in cases of serious violations of the Conventions or of Protocol I, the High Contracting Parties "undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter". The application of the Geneva Conventions and of humanitarian law has of course often been at the center of discussions in the General Assembly, the Security Council and other organs of the United Nations, such as the Commission on Human Rights. In view of the great extent of needs and the diversity of situations, it is obvious that the United Nations and all the humanitarian organizations as a whole must collaborate, and seek the means of multiplying humanitarian action, both in the application of the law and in assistance to the victims.

Ever since the beginning of its existence, the ICRC has played an essential part as initiator or as instigator, both in the field of action as in that of humanitarian law. The ICRC could develop further its role and attract greater interest from other organizations and other movements, to support its action, to co-operate and even to take over its own operations, chiefly after the emergency period is over.

Although co-operation with the United Nations system and with voluntary organizations is developing, this could not eclipse the privileged co-operation with the National Red Cross and Red Crescent Societies and their 250 million members throughout the world.

The ICRC and the Red Cross and Red Crescent movement as a whole could thus ensure the broadest possible support both for their preoccupations and for their operations, on the part of various institutions, communities, movements and people. Efforts should also be made to seek to deepen the points of agreement and to provoke the convergence of interests with other bodies in favour of the victims of conflicts. Contemporary guerrilla-type conflicts often bring about multiform disasters upon the affected populations: starvation, epidemics, displacement of populations, destruction of harvests, of villages and of means of production.

The problems of food, medical and housing assistance, and even of the continuation of schooling and of productive activities, require co-operation between humanitarian organizations; Kampuchea, from 1979 to 1980 particularly, provided a striking example in this respect.

The problem of the distribution of competence between humanitarian organizations, especially within the United Nations system, has given rise to a series of discussions: on the initiative of Sweden, the Economic

and Social Council (ECOSOC) adopted in July 1980 a resolution entitled "International efforts to meet humanitarian needs in emergency situations" which was followed later by a number of resolutions of the General Assembly of the United Nations.

It is obvious that clarifications regarding competence have sometimes been necessary, that donor Governments are increasingly demanding proof of the judicious use of the funds granted and of the absence of duplication among organizations. These operations to check the judicious use of funds are carried out at best according to the needs in each situation rather than in an arbitrary manner and once and for all. It has, however, become increasingly common either for a "Memorandum of Agreement" to be concluded between organizations (e.g. between UNHCR and UNDRO) defining their respective fields of competence, or for arrangements to be adopted, as has been the case between the ICRC and UNICEF for their joint action in Kampuchea, specifying the distribution of tasks in relation to the donor Governments and in relation to the recipient authorities and populations.

The need for co-operation between the ICRC, HCR and UNRWA, for example, regarding the assistance to, and protection of, the refugees in the Middle East, has shown that it is not so much any duplication of mandates but rather the gaps existing between the mandates of the various humanitarian organizations which are revealed by concrete situations.

These gaps can sometimes be filled in a general way, as has been the case with Resolution XXI on the action of the International Red Cross in favour of refugees, adopted by the 1981 International Red Cross Conference held at Manila; this resolution, while recalling the primordial role of the UNHCR in the field of international protection of, and material assistance to refugees, to persons displaced from their country of origin and to repatriates, reaffirms the role of the International Red Cross in favour of these victims, especially in those cases in which they do not come within the mandate of the UNHCR.

Sometimes as well, these appeals will have to be made while the heat is on. This was the case for the appeal made by the ICRC on 19 March 1979, in the Rhodesia/Zimbabwe conflict, in which a series of pressing and specific requests were addressed to each of the Parties to the conflict and to all the States Parties to the Geneva Conventions, in particular to the United Kingdom, as also to the "front-line" States (Angola, Botswana, Mozambique, Tanzania, Zambia), the members of the United Nations Security Council, the President of the Organization for African Unity and the Secretary General of the United Nations, inviting them to support the appeal by the ICRC.

Both as regards assistance and as regards protection, the co-operation and the responsible attitude of all is indispensable.

10. Conclusion

Faced with the increase in violence and with the increasingly grave and ever more frequent provocations it is necessary to seek the most appropriate and the simplest remedies, as well as the broadest possible co-operation.

The goal must be not so much a new codification, but the rooting of the existing values and standards, if possible even progressively extending them by means of a generous interpretation and application. This is the task which now remains to be carried out.

In order to make themselves heard, the jurists responsible for the application and dissemination of humanitarian law must also accept to listen, to enter into dialogue with the other disciplines, to try to understand the humanism of civilisations and of major contemporary currents of thought; they must not ignore the subjective nature, and even the passionate aspects of nearly all the parties to present-day conflicts.

The emphasis must be placed in the research and study in depth of universal humanitarian principles and of international and national standards so as to convert them into rules of positive law. A New International Humanitarian Order exists already in positive law, for the law of armed conflicts, since 1977: the Protocols additional to the Geneva Conventions of 1949 contain the essential humanitarian standards adapted to contemporary conflicts; they must still, however, be ratified, interpreted in a consistent manner and applied.

More than ever, it is also desirable to deepen and to reaffirm the humanitarian principles, the first of which is the recognition of the value of life and in particular the value of human life; as a corollary, it is necessary to define the limits of violence, if possible on a reciprocal basis, but unilaterally if necessary.

Perhaps in this way it will be possible gradually to neutralize hatred, to create step by step a climate of dialogue, by means of gestures of good will, a generous imagination and practical sense, as in the case of Henry Dunant at Solferino, and to try to think in terms of one single human family, of a planet-wide unity of life and of humanity.

In other words, it is necessary to realize and to make others realize, that in guerrilla warfare as in all the other types of conflicts, idealism combines with practical considerations to demand, in constantly updated

forms, the imaginative implementation of respect for the common humanity shared with persons and communities temporarily characterized as enemies, with whom it is necessary to contemplate as of now the survival of the species and of the planet and the continuation of history and of civilization.

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Succinct bibliography

ABI-SAAB, Georges, « Les mécanismes de mise en œuvre du droit humanitaire », *Revue générale de droit international public*, Vol. 82, N° 1, 1978, pp. 103-129.

ABI-SAAB, Georges, "Wars of National Liberation in the Geneva Conventions and Protocols", *Recueil des Cours* (Collected Courses of the Hague Academy of International Law), 1979, IV, pp. 353-445.

BOTHE, Michael — PARTSCH, Karl Joseph — SOLF, Waldemar, *New rules for victims of armed conflicts: Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949*, The Hague, Nijhoff, 1982, 746 p.

BRETTON, Philippe, « L'incidence des guerres contemporaines sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés internationaux et non internationaux », *Journal du droit international-Clunet*, 1978, pp. 208-271.

DRAPER, G.I.A.D., "Implementation and Enforcement of the Geneva Conventions and of the two Additional Protocols of 1977", *Recueil des Cours* (Collected Courses of the Hague Academy of International Law), Vol. 164, III, 1979, pp. 1-54.

GRAEFRATH, Bernhard, « Zum Anwendungsbereich der Ergänzungsprotokolle zu den Genfer Abkommen vom 12. August 1949, *Staat und Recht*, Berlin, 1980, Nr. 2, pp. 133-146.

HERCZEGH, Géza, « Problèmes de la réaffirmation et du développement du droit international humanitaire », *Acta juridica Academiae Scientarum Hungaricae*, 1977, pp. 333-361.

KALSHOVEN, Frits, "Reaffirmation and development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva 1974-1977 », *Netherlands Yearbook of International Law*, 1978, pp. 107-171.

MEYROWITZ, Henri, « Le bombardement stratégique d'après le Protocole I additionnel aux Conventions de Genève de 1949 », *Zaõru*, 1981, pp. 1-68.

NAHLIK, S. E., « Le problème des représailles à la lumière des travaux de la Conférence diplomatique sur le droit humanitaire », *R.G.D.I.P.*, 1978, Nº 1.

SCHINDLER, Dietrich, "The Different Types of Armed Conflicts according to the Geneva Conventions and Protocols", *Recueil des Cours*, 1979, II, pp. 117-164.

SULTAN, Hamed, « La conception islamique du droit international humanitaire dans les conflits armés », *Revue égyptienne de droit international*, 1978, pp. 1-19.